

**IN THE UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, *et al.*

Plaintiffs,

vs.

TYSON FOODS, INC., *et al.*

Defendants.

Case # 05CV0329-GKF-PJC

**DEFENDANTS' JOINT BRIEF IN REPLY TO PLAINTIFFS' RESPONSE  
TO MOTION *IN LIMINE* TO PROHIBIT PLAINTIFFS' TESTIMONY  
REGARDING DATA ACQUIRED AND ANALYZED  
BEYOND EXPERT REPORTING DEADLINES [DKT. NOS. 2400 AND 2511]**

***I. Discussion***

Plaintiffs assert in their Response that problems associated with land application of poultry litter in the IRW are “ongoing”, and that this serves as justification for disregarding the Court’s deadlines in the case through continued sampling, analysis and opinion prepared well after any expert, discovery or other deadline in the case. (*See* Plaintiffs’ Response, Dkt. #2511, p. 1) Whether or not Plaintiffs believe that the alleged problem is ongoing, this Court has set certain deadlines in the case. Plaintiffs seem to believe that those deadlines do not apply if they craft their allegations as “ongoing,” and that they can then intentionally disregard those deadlines.

Plaintiffs in fact complain that requiring them to comply with the Court’s scheduling orders with regard to sampling, analysis and opinions “artificially constrains” their work (toward various unspecified goals) in the IRW. *Id.*, p. 2. However, Defendants have never asked the Court to prevent Plaintiffs from continuing to sample in the IRW. What Defendants have sought is merely compliance with the Court’s scheduling orders when it comes to the evidence that will

be introduced at the trial. Plaintiffs certainly are free to gather all the data they like into perpetuity, but that is a different question from what will be admissible at the trial of this case.

Plaintiffs finally complain that Defendants performed sampling of their own in 2009. Plaintiffs seek to justify that which is unjustifiable; that is their behavior of having collected and analyzed data out of compliance with the scheduling orders with the intent that they nevertheless be allowed to utilize the information at trial. Thus, Plaintiffs try to shift the focus off of their improper behavior and onto Defendants' sampling efforts. What Plaintiffs fail to mention is that Defendants' sampling was a limited sampling effort regarding macroinvertebrates and fish, and that it was done with specific permission from the Court *in advance* of the sampling campaign and in accordance with the Court's scheduling orders. There has been no sampling by Defendants other than that which fit squarely within the Court's scheduling orders.

Plaintiffs, alternate between casting the Defendants' sampling as unfair (i.e. Defendants were allowed to sample in 2009 and now seek to prevent Plaintiffs from using their own untimely sampling and analysis occurring from June, 2008 to the present) and as justification for their theory that they can offer opinions about their own untimely sampling as "rebuttal." As to the former complaint that the situation is unfair, after briefing and a hearing the Court allowed Defendants sought to conduct a spring sampling campaign in 2009 for fish and macroinvertebrates only because Plaintiffs had conducted seasonal sampling for those species in 2006 and 2007. Defendants received Plaintiffs' expert reports in May, 2008. The Court determined that it was fair to allow Defendants to conduct their own seasonal sampling by allowing Jim Chadwick, Rich Merritt and Ken Cummins to perform spring sampling in 2009 (the next available spring season after receipt of the Plaintiffs' expert reports). [Dkt #1756]. Defendants did perform such sampling, and submitted their timely reports within the Court's

scheduling orders. Defendants have not thereafter conducted additional sampling, and have submitted the work of all of their experts in accordance with the Court's scheduling orders. While Plaintiffs make much of the fact that this sampling by the defense was after the discovery cutoff (*See* Plaintiffs' Response, p. 4), both sides of the case knew for 8 months between the granting of leave to conduct spring sampling and the expert reporting deadline for such sampling that the sampling was to occur. Further, the parties sought and received joint leave to allow the depositions of Chadwick, Merritt and Cummins to occur after the discovery cutoff for just that reason. [Dkt #1979]. Thus, there was no prejudice to Plaintiffs whatsoever in this construct.

This is a far cry from Plaintiffs' conduct. Plaintiffs have continued to perform sampling well beyond their deadlines in May, 2008. They have done so without seeking leave of the Court. They have done so well after their experts have been deposed. Plaintiffs have then either sought to supplement their reports with this information (Dkt Nos. 1839 and 1842) or to create new analysis of the late acquired data and spring it on defense experts in depositions after having failed to previously produce it to the defense in accordance with expert deadlines or pending discovery requests (Dkt #1972). This Court has issued orders prohibiting supplemental and rebuttal reports (Dkt Nos. 1839 and 1842) and advising that this new analysis was not permissible rebuttal (Dkt #1972). Plaintiffs' conduct is therefore very distinguishable from that of Defendants – Defendants have complied with the deadlines and the Court's subsequent orders, and Plaintiffs have not. Moreover, Plaintiffs' conduct in continuing to collect and analyze new data for trial after expert deadlines, depositions, and discovery deadlines in the case, and in contradiction of the Court's other applicable orders on the subject, is prejudicial to Defendants.

In fact, Plaintiffs' theory of data collection seems to indicate that they believe they can continue to collect and analyze data even up to and during the trial, and that such data and expert

analysis and opinion based on the new data would be fully admissible at the trial. Defendants are hard pressed to think of a “gotcha” scenario much more in conflict with the modern rules of discovery.

Moreover, even if the Court were to accept the premise that because Defendants were allowed to collect data in 2009 with the Court’s leave, Plaintiffs should be allowed to go out on their own and do unending sampling and analysis for anticipatory rebuttal, Plaintiffs have not submitted new data that is limited to the fish and macroinvertebrate sampling that Defendants performed in 2009. Plaintiffs have collected a mountain of data unbounded by anything performed by Defendants in Spring, 2009. They have continued to sample litter, soil, edge of field, reservoir, water and other parameters since the expiration of their expert reporting deadlines in May, 2008 with the expressed intent of using such data at trial. Their exhibit list and the exhibits used at several depositions indicate that they have prepared revised versions of the tables, charts and graphs in their original expert reports which now incorporate the late-collected data and have had their experts perform supplemental trophic state analysis, water residence time analysis, PCA analysis, algal, fish and invertebrate analysis, just to name a few areas. Thus, the argument put forth by Plaintiffs in response to this Motion *in Limine* that they are merely preparing a rebuttal case for Defendants’ Spring, 2009 sampling of fish and macroinvertebrates is simply not true. (See Plaintiffs’ Response, pp. 2-3) In fact, Plaintiffs’ argument that their sampling between June, 2008 and May, 2009 (i.e. the timeframe between their expert reports in May, 2008 and the May, 2009 reports by Chadwick et al on the Defendants’ Spring, 2009 sampling) is “rebuttal” to Defendants’ 2009 sampling that had not even yet occurred is patently absurd.

Plaintiffs seek to distinguish the primary case cited by the Defendants, *Cook v. Rockwell Intern. Corp.*, and state that it is “easily distinguishable” from the case at hand, but the Defendants see no difference. 580 F.Supp.2d 1071 (D. Colo. 2006). Here, as in *Cook*, Plaintiffs seem to believe that the expert report and accompanying deadline is merely a guideline of some sort, and that they can continually add new data and analysis and offer new opinions about subsequently collected information without regard to the schedule. Plaintiffs’ fallback is that they are merely preparing rebuttal. Aside from the fallacies already pointed out with regard to the timing and unlimited scope of their data collection compared to Defendants’ Spring, 2009 sampling, and the lack of any leave of this Court to prepare such rebuttal, the data and analysis by Plaintiffs is not rebuttal because, as the Court has opined, “the opinions and theories of defendants’ experts will have been fully revealed to plaintiff through expert reports. It is unlikely that any attempt by defendants’ experts to opine as to some as yet unrevealed theory or opinion will be permitted.” [Dkt. #1989, p. 2, n. 1]. Thus, there is no need to prepare rebuttal expert analysis based on new data. Defendants merely seek the Court’s order that this late analysis is not to be used at trial. Plaintiffs can continue to collect it for whatever other purposes they wish, but they should not be allowed to use it at the trial if the Court’s deadlines are to mean anything.

Plaintiffs also argue that Defendants have reviewed and used Plaintiffs’ late-acquired data and therefore have “opened the door” to its use by Plaintiffs at trial. (p.4) They reference specifically its use by defense expert John Connelly in Figure 8-1 of his report and by defense expert Tim Sullivan in Figure 10-1 of his report. First, Defendants are confused by the reference to Connolly Figure 8-1. The text of Connolly's report says Figure 8-1 shows data from 2005, 2006, and 2007. *See* Connolly Report at page. 8-1. Sullivan’s Figure 10-1 does plainly use 2008 data collected after deadlines by Plaintiffs. However, that is because Defendants have no idea

whether the Court will allow or disallow Plaintiffs' late-acquired data. Defendants maintain that neither side should use post-expert deadline data. While Defendants believe the data, analysis and opinions should be excluded at trial for the reasons urged in the Motion, Defendants were not required to engage in a mutual suicide pact with Plaintiffs, knowing that Plaintiffs were flaunting the deadlines with the intent to use the data, yet hoping that the Court would exclude the data. Thus, the fact that the defense experts used some of the data in no way "opens the door" to anything. But if the Court disagrees, then both sides should be limited to using only Plaintiffs' late-submitted data that the defense experts included in their reports, and the Court should still exclude the remaining mountain of late data Plaintiffs have acquired. Further, if the Court determines any of the remaining data Plaintiffs acquired or analyzed beyond their discovery deadlines is admissible, then discovery should be reopened for the Plaintiffs' experts who relied upon this information *after* their depositions in order for Defendants to have the full opportunity to discover what opinions and analyses Plaintiffs' experts plan to present at trial based on the later acquired information.

Plaintiffs' and Defendants' scientific experts do appear to agree on one thing -- that more data is better than less data (*See* Plaintiffs' Response, p.5) when preparing scientific analysis. However, this litigation is not a purely scientific exercise. Litigants and attorneys, and therefore expert witnesses, have to live with deadlines and the evidence available to them at the time those deadlines accrue. The fact that Plaintiffs elicited testimony from some experts that those experts like to have as much data as they can get begs the questions of what data was acquired in accordance with the Court's scheduling deadlines, and what analysis and opinion is admissible at trial. In the final analysis, Plaintiffs have failed to cite this Court to a single case which would support their argument that they ought to be allowed to continue to collect new data up to and

even during the trial, long after all applicable scheduling deadlines have passed, and the be allowed to offer analysis and opinion about that data into evidence at the trial without Defendants ever having had the opportunity to cross examine the as-yet-unknown new opinions based on the late-acquired data. Yet, Plaintiffs urge this Court to allow them to do that very thing, to the prejudice of Defendants.

Finally, Plaintiffs complain that Defendants did not attach the actual data at issue to their Motion. However, Defendants did create a summary chart to avoid inundating the Court with thousands of pages of data. Certainly, if Plaintiffs had a concern about the chart they could have pointed out any errors they believed it contained and/or provided the Court with the data. Defendants have offered to provide the data to the Court should the Court want to review it. Plaintiffs similarly complain that the Defendants did not attach the exhibits to the depositions that were the subject of a separate Motion to Clarify and corresponding order. [Dkt. Nos. 1972, 1972-2, 1974-4, 1972-7, 1972-9, 1972-10, 1972-11, 1972-12, and 1989 #]. Those documents were attached to an earlier pleading, and Defendants elected to eliminate reproduction of those exhibits to the Court again by incorporating them by reference to their earlier docket and exhibit number in the Motion *in Limine*. Again, if Plaintiffs had a legitimate concern about this issue, they could have reproduced those exhibits to the Court. Defendants can certainly resupply them to the Court if the Court needs the parties to do so.

## ***II. CONCLUSION***

As the Court is aware, “the orderly conduct of litigation demands that expert opinions reach closure.” *Miller v. Pfizer, Inc.*, 356 F.3d 1326, 1334 (10th Cir. 2004). Permitting Plaintiffs’ continual supplementation of their expert work and permitting Plaintiffs’ experts to opine on data acquired and analyzed beyond the close of Plaintiffs’ expert deadlines unfairly

prejudices Defendants and is counter to the timely resolution of this matter. For the reasons stated herein and in their Motion *in Limine*, the Defendants respectfully request the Court enter an Order prohibiting Plaintiffs' testimony or exhibits regarding data acquired and analyzed beyond their expert reporting deadlines and for any and all other relief to which they may be entitled.

Respectfully submitted,

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